UNITED STATES SUPREME COURT.

ELIAS S. A. DE LIMA and others, AGAINST GEORGE R. BIDWELL.	No. 456.
SAMUEL B. DOWNES AGAINST GEORGE R. BIDWELL.	No. 507.

OPENING ARGUMENT OF MR. COUDERT FOR PLAINTIFF IN ERROR.

January 8, 1901.

If the Honorable Court please, the first one of these cases to which I shall advert is No. 456, the case of De Lima *v.* Bidwell. The facts in the case are simple, and I will state them very briefly.

In that case certain cargoes of sugar were imported from Porto Rico, in November, 1899, and the Collector imposed—attempted to impose and did impose—duties upon those goods under the Tariff Law, the so-called Dingley Act. The Court will observe that the exaction of these duties was made some time, nearly a year, after the treaty between Spain and the United States ceding the Island of Porto Rico to the United States.

The facts in No. 507 are similar; merchandise was imported from Porto Rico, and duty was collected by the Collector, and paid under protest. One

difference, however, between the two cases is that the duty in the second case was collected under the Foraker Act, which exacted a duty of 15 per cent. of the Dingley rates.

That is the only difference so far as the facts in these two cases are concerned, in one the duties were collected under the Dingley Act, the full tariff duties on all goods imported into the United States from foreign countries, and in the other case the duties were collected under the Foraker Act of April 12, 1900, specifically imposing duties on goods from Porto Rico, and were 15 per cent. of the general tariff rate.

In the first case the plaintiff in error sued the Collector directly in the Supreme Court of the State of New York for the recovery of the duties in an ordinary common law action against the Collector individually.

This action the Collector had removed into the Circuit Court of the United States, and there demurred:

(1) On the ground of lack of jurisdiction, and

(2) On the ground that the facts set up did not state a cause of action.

The demurrer in both of these cases was sustained on the ground that the complaint did not set forth a cause of action.

MR. JUSTICE HARLAN: What is the meaning there of "want of jurisdiction"?

MR. COUDERT: The Government contended that the action should not have been against the Collector individually, but should have been under the Customs Administrative Act against the United States; setting up want of jurisdiction was equivalent to saying that we had mistaken our remedy and adopted an erroneous procedure.

If the jurisdiction point were sustained, it could only be on the ground that the goods were "imported from a foreign country." It raised the question, it seems to us, which is to settle this case.

If your Honor please, the reason we adopted this form

of procedure was because, on our theory, this was not a customs case at all. It was precisely as though goods had been imported from Florida, New Jersey or Arizona, and the Collector had levied, and forced the plaintiff by distress of goods to pay duty on such goods; clearly that would not fall within the category of customs cases. As we have, however, discussed this point fully in the printed brief, I do not intend to take the time of the learned Court by arguing it orally.

But I want to call attention to the case which it seems to me settles the question of procedure beyond peradventure. That is the Fassett case, in 142 U. S., in which the Collector endeavored to levy, under the Dingley Act, duties on Mr. Vanderbilt's yacht the *Conqueror*. An action was brought against the Collector for the return of the yacht and for damages, an action in tort; it was contended by counsel for the Collector that the action would not lie because an adequate remedy was furnished under the Customs Administrative Act of 1890; this point the Court answered, as it seems to us quite conclusively, in this way:

> "The appeal provided for in No. 15 brings up
> "for review in court only the decision of the Board
> "of General Appraisers as to the construction of
> "the law, and the facts respecting the classifica-
> "tion of imported merchandise, and the rate of
> "duty imposed thereon under such classification.
> "It does not bring up for review the question of
> "whether an article is imported merchandise or
> "not; nor, under No. 15, is the ascertainment of
> "that fact such a 'decision' as is provided for."

I will read another short passage from that same decision:

> "Under the Customs Administratrive Act, the
> "libellant, in order to have the benefit of proceed-
> "ings thereunder, *must concede that the vessel is*
> "*imported merchandise,* which is the very ques-

" tion put in contention under the libel, and must
" make entry of her as imported merchandise, with
" an invoice and a consular certificate to that effect,
" and thus estop himself from maintaining the fact
" which he alleges in his libel, that she is not im-
" ported merchandise."

So that it seems to me almost unnecessary to argue the question further except to say that if it be urged on the other side that the Customs Administrative Act, by repealing the old procedure takes away the remedy against the Collector, that repeal does not apply to this case. It only takes away the remedy against the Collector in a purely customs case, and it does not make the Collector a non-suable person for any tort he may have committed under color of office. That is clear and manifest.

There is nothing in the record to show that he has in fact turned into the Treasury the moneys which he received from customs, and upon our hypothesis that this is not a customs case, a statute directing him to turn in such money in customs cases would not govern his action in this case, and there is no reason to suppose that he has done so.

If he has done so, then it is very clear that judgment will be issued against him, but the execution will be against the United States under Section 989 of the Revised Statutes, which is still in force and has recently been recognized as being in force by this Honorable Court.

That section provides that whenever a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the Treasury, in the performance of his official duty, and the Court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary, or other proper officer of the Government, then no "execution"—not judgment, but "execu-

tion "—" no execution shall issue against the Collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury."

This section seems almost to have contemplated this precise case and was referred to in the case of Cruikshank *v.* Bidwell, in which it was attempted to obtain an injunction against the Collector. The Court there held, and very properly, that it was not a case for equity jurisdiction, but that the action should have been against the Collector, and that the Collector could have responded in damages. To the suggestion that he no longer had the money in his possession, and therefore the basis of the action which was unjust enrichment, might no longer exist, this Court answered that under Section 989 the Collector was fully and absolutely protected.

Of course, in this case, whether it be considered that under the Dingley Law the action of the Collector was unlawful in that he misinterpreted the law, or whether the law which gave him the power was itself unconstitutional, as in the Cruikshank case, the result would be the same. He was acting beyond his authority as Collector in either case.

As regards the merits of both of these cases, they have been discussed so fully and the discussion has taken such a broad, wide and varied range, that it seems proper at this stage of the case to enunciate certain propositions upon which we rely. Some of them may be conceded in whole or in part, others may be contested, and it may be necessary to elaborate them. We do not suppose it necessary to argue them all, but we desire to give a bird's-eye view of our position in order that the Court may understand exactly where we stand.

We claim, first, that these goods were not imported from a foreign country, and should the Court hold that they were not imported from a foreign country, further discussion as to the status of that

country would be unimportant, and the plaintiff would be entitled to recover. The Collector had no other authority than the Dingley Act, and that authorized him only to levy upon goods "imported from foreign countries." Therefore, the first question is: Was Porto Rico a foreign country?

Our propositions as to the Constitutional questions are as follows:

A treaty duly entered into is law, and has the force of statute until superseded by subsequent enactments. The Treaty of Paris ceded Puerto Rico to the United States. Puerto Rico then came completely under the sovereignty and dominion of the United States under the American statutory name of Porto Rico. The political map of the world was changed, and Porto Rico became geographically a part of this country, which we call the United States, and which Chief Justice Marshall called the "American Empire."

The clause of the treaty leaving the determination of the "civil rights and political status" of the native inhabitants to Congress, was, we contend, merely declaratory of the law and placed in the treaty out of an abundance of caution, since by the Constitution and existing law all territories lawfully acquired and taken under the sovereign jurisdiction of the United States became a part thereof, and Congress had the power to govern the same and to withhold or grant political rights in reference thereto.

Mr. Justice White: Will you repeat that second proposition?

Mr. Coudert: The clause of the treaty leaving the determination of the "civil rights and political status" of the native inhabitants to Congress was merely declaratory of the power given by the Constitution to withhold political rights and franchises and to establish civil government, and to enact municipal law in all places where no state government exists.

We contend that that clause gave no peculiar right to Congress not given by the Constitution.

The Constitution in our view is a charter or grant of powers conferred upon the Federal government by the people of the United States. The Federal government has no existence outside of this charter, hence it is a confusion of terms to speak of territory to which the United States has acquired title being within "our Constitutional boundaries." It is a confounding of ideas to speak of such territory as not "under our organic law."

Wherever the Government of the United States moves, in whatever sphere it acts, it is there by virtue of, and accompanied by, the Constitution. This of course does not mean that all the clauses of the Constitution are applicable in any one particular case. On the contrary, I think it may be asserted without fear of contradiction that there is not one foot of space on the earth's surface to which every single clause of the Constitution is applicable. It is therefore a question as to which clauses of the Constitution are applicable to the Government acting under different circumstances.

We believe it to be a rule of constitutional law recognized time and again by this honorable tribunal, that territory held by military occupation during hostilities or as an incident thereto is subject to, and governed by, the President as Commander-in-Chief. The President is Commander-in-Chief under the Constitution. No limitations are placed by the Constitution upon that power. He has full authority to wage war, subject only to the general rules observed by civilized nations, because naturally the war spoken of by the Constitution would be civilized warfare, not war as known to and practiced by the Zulus or Apaches.

Therefore under belligerent right the Constitution gives him the power to wage war without the limitations imposed upon the civil government.

Territory acquired by the law or treaty making power and hence coming under the sovereign jurisdiction of the United States, may be governed by the Executive until Congress undertakes its government.

We contend, although it may not have a direct bearing in this case (the Court below in a similar case seemed to think that it did)—we contend that the moment war is over, and the moment that the cessation of hostilities becomes a political fact, which this Court will recognize, the government in that territory carried on by the President, through the agency of army officers, ceases to be a government of belligerent rights, and becomes the *de facto* government in that territory, remaining such until Congress acts. As such *de facto* government it is limited by certain clauses in the Constitution which apply to all governments except those springing from the exercise of belligerent rights during war, and to such *de facto* government although carried on in military forms and by military agencies certain clauses of the Constitution, such as the Bill of Rights and Uniformity of duties, apply.

As to the status of the inhabitants of the ceded territories we do not think that that question is absolutely necessary or relevant in this case. It seems to me the status of these inhabitants throws a certain indirect light upon the question, although we claim that the question is solely as to the geographical origin of the goods; if they come from one part of the United States to another, then the tax must be the same, on the same article, wherever from. It is immaterial how that part of the United States may be governed, or what may be the status of the people, foreign or alien. But we will assume that that question has some relevance, because the learned counsel for the Government has devoted so much space to it in his argument that it would be unkind, at least, to say it has not——

Mr. Justice Brown: Under what clause of the Constitution do you argue that Congress has the power to govern this territory; under the power to make rules and regulations, or under the more general power? In the case of Dred Scott the Chief Justice said that the power of making rules and regulations for the Territories of

the United States applied only to the Territories in existence when the Constitution was adopted, and it did not apply to the territory west of the Mississippi River.

MR. COUDERT: I am glad your Honor asked that question, because it enables me to be a little explicit upon that point. We do not claim that to be the rule. While we feel that as a matter of fact it was the opinion of the framers of the Constitution, that the rules and regulations clause applied to the disposition of the land, and the real estate of the settlers, and that it was not a governmental clause at all, yet we do not believe our case to be affected by the correctness of that view one way or the other. That Congress has power to govern the Territories we do not for one moment doubt. Some of the subsequent cases have gone back to the doctrine of the early cases decided by Chief Justice Marshall.

MR. JUSTICE BROWN: It was held in Dred Scott that the power to make rules and regulations was merely a private power, and not a governmental power.

MR. COUDERT: That it was a mere private power, and if our cases depended upon that, we could argue from that point of view, which has much force.

But so far as we are concerned, we admit, first the power to acquire and then to govern. The only question is how to govern, and under what limitations. The acquisitive power is not denied.

I was speaking of the status of the inhabitants of these Territories. We have touched on that, for the reason that we think it throws, indirectly, light upon the essential question. The greater, as I understand it, includes the less. That is a geometrical axiom with which even the attorneys for the Government will not quarrel.

If the inhabitants of these islands are citizens of the United States by virtue of the cession, I presume it would be admitted that the islands themselves were part of the United States, and while our case is independent of the status of the inhabitants as individuals, yet I think it can be clearly shown that by

the cession the inhabitants became citizens, and therefore the Territory of which they are inhabitants naturally becomes a part of the United States.

We contend that while an argument from the consequences which may follow a decision is not always the best argument, it has been held by this Court in one most important case, and in other cases of lesser importance, that such an argument is legitimate and may in cases of considerable importance, where there is doubt, be considered by this Court, and we claim, and claim without fear of contradiction, that the only consequence which is feared, should it be held that Porto Rico was a part of the United States, is the consequence that the inhabitants of this territory would have free access to the markets of the United States. We shall also further contend that that is not so awful and so fearful a consequence that the Court should shrink from adopting an interpretation which might sanction it.

To take up the argument in detail. The Dingley Act, we submit, applies, and can only apply, to goods imported from foreign countries. Porto Rico was not at the time of the passage of the Dingley Act, and was not at the time when these goods were attempted to be seized and levied upon, a foreign country.

Were this not a question of law, but merely a question of correct nomenclature or common sense, the question could hardly be arguable. The words "foreign country" have and can only have one meaning in a political sense. The expression means a country foreign to our own, under a foreign sovereign, under a foreign jurisdiction.

We claim that no country which is under the full and sovereign jurisdiction of the United States, to which no other country has any claim under any doctrine of international law, but which is wholly and absolutely under the immediate sovereignty of the United States, can possibly by any construction of terms be "foreign." In order to be "foreign" it must be under a different sovereignty, belonging to a different member

of the family of nations as known to public law. At the time that the Dingley Act was enacted, and at all times since it has been in force, that was exactly what was meant by "foreign country." That is the exact rule which this Court has laid down. It has followed the definition of the customs regulations, which define a foreign country, as Webster and Worcester define it, as "an inhabited place under a foreign sovereign." Such is the accepted definition.

Of course, I am aware that for certain purposes the States of the Union are said to be foreign to each other. In the first place, it may be said that this is only a statutory arrangement, and that they are not foreign in the full sense of the word; and in the second place it is very clear that the origin of the idea was that they were originally fully sovereign, when they were thirteen independent States; that they were as foreign to each other then as Great Britain and France are foreign to each other now, and that it is simply the remnants of such State sovereignty which gave rise to that peculiar use of the term.

It may also be said that they have a sovereign jurisdiction for certain purposes, but the sovereignty over Porto Rico after the cession was the sovereignty of the people of the United States, and certainly Porto Rico could not be foreign to its own sovereign.

There was no government there to be foreign to the United States, there was no sovereignty there to be foreign to the Government at the Capital. It was precisely the same sovereignty as that under which the States themselves live. It was not under the government of any particular State, and therefore, even in that narrow sense, it could not be said to be foreign to the States.

It was under the jurisdiction of all the people, of all the States, and under such jurisdiction of course it is impossible to say that all the people of all the States governing through their own government one particular Territory, are foreign to that Territory.

Therefore, we very earnestly and respectfully submit that there is no possible theory upon which the Dingley Act can be tortured into an authority for the exclusion of goods from Porto Rico.

The Foraker Act makes this distinction between foreign countries and Porto Rico clear, because it enacts that there shall be certain duties upon goods from Porto Rico which shall be 15 per cent. of the duties levied upon goods *from foreign countries,* under the Dingley law.

Thus this construction differentiates between Porto Rico and foreign countries, and in making that distinction it acknowledges the existence of the fact, and is declaratory of the fact, but does not legislate that distinction into existence.

In this connection I will read a few lines from Mr. Justice Story:

> "By a foreign port may be understood a port "within the dominion of a foreign sovereign, and "without the dominion of the United States."

Assuming, then, that Porto Rico is not a foreign country, and is a part of the United States, we respectfully submit that the exaction of duties was under a statute which, if meant to exact duties on the products of a country which was a part of the United States, was invalid and unconstitutional for the reason that all duties, imposts and excises must be uniform throughout the United States. If these propositions are correct, then Porto Rico, being a part of the United States, is therefore subject to this clause of the Constitution, and any law applying to it must conform to this restriction, otherwise it is unconstitutional.

Uniformity in taxation, as I understand it, means geographical uniformity. The same article must pay the same duty when coming from any one part of the United States to another; that is, sugar from Porto Rico must pay the same duty as sugar from Louisiana, and tobacco

from Porto Rico must pay the same rate as tobacco from Virginia or Maryland, so that there can be no doubt that if Porto Rico be within the United States, the Dingley law and the Foraker law taxing those goods are unconstitutional for lack of uniformity.

MR. JUSTICE BROWN: Does it necessarily follow, conceding your proposition that Porto Rico was not a foreign country, under the Dingley Act, does it necessarily follow that it is a part of the United States?

MR. COUDERT: I think that it does, if your Honor please, and I propose to argue that point a little more fully. My point is that the exaction of the duty was illegal, because whatever else it might be its status was not that of a foreign country.

I do not know quite what view the learned counsel for the Government take generally as to the Constitution and its limitations. The Court below in the Goetze case, the decision here followed, seemed to think that the Constitution only extended over the States of the United States. It may, therefore, be well to state in a little more detail than we have already done, just exactly what our view of the Constitution is.

There have been certain phrases used, metaphors which may have a place in the shifting arena of politics, but which are not scientific, are not accurate, and which should not be allowed to confuse the issues in this case, such as the "Constitution follows the flag" or extends *"ex proprio vigore."* These are inaccurate expressions.

Our contention is simply this, as to the Constitution, that the Constitution is not, as one of our learned friends seems to think, something applicable to any particular Territory. It is not a constitution of land laws. It is a constitution of government. It created and made a government. The Constitution could not be extended or expanded. The Government might go anywhere, from the North Pole to Indo China. The Con-

stitution was not therefore extended. It was the Government created by the Constitution which was extended to those Territories, which Territories are simply land under the jurisdiction of the Government created by the Constitution. That this is a constitution of government, not a land law, is a fact constantly overlooked.

MR. JUSTICE WHITE: Is that not simply stating the proposition differently? Isn't it simply changing the form of statement, and does not the question then become whether under the Constitution the particular powers were to go everywhere or to be somewhere?

MR. COUDERT: It seems so to me, and I would not have stated the proposition in so many ways if I did not believe that it had been so misunderstood.

The United States may do what it pleases and go where it pleases, and it is absurd to speak of it, as the counsel for the Government has done in this case, as a crippled nation if restricted by the uniformity clause in taxing colonial products.

The nation is omnipotent, and its only limitation of power is the limitation which may be placed upon it by the physical force of other nations. This nation, however, did what I believe no other nation ever did; it passed a self-denying ordinance. It decided that the Government should not do certain things until it, by a full majority of its citizens, had decided to allow it to do those things, and to give the Government a freer hand.

Our nation may do anything, but there are many things our rulers cannot do. I would have hesitated to discuss this if we had not had this constant reiteration of the phrase "crippled nation." I do not know if any counsel, except counsel for the Government, has ever used it of this nation before. I am sure I never heard it from anybody until the Circuit Court and the learned Attorney General used it.

Therefore, it being conceded that the Government has no sphere outside of the Constitution, and must act within that sphere, until the Constitution is changed,

then we come to the vital question in this case as to whether within the meaning of the uniformity clause Porto Rico is a part of the United States.

I suppose there are two ways in which every proposition can be proved, and only two. If these methods are carried out perfectly, the proof is complete. The first is from general principles down to particular propositions. If the general principles and the line of deduction are correct, the proposition is correct, and in the second place we can reason from a great number of particular instances, and thereby reach a particular proposition. I think we can show Porto Rico to be a part of the United States within the meaning of the Constitution by both of these methods.

In the first place, viewing the language of the Constitution itself. If that were all we had and we interpreted it according to the ordinary sense given to the phrase, there could scarcely be any question as to what was meant in the taxing clause by "throughout the United States."

In the second place, if examining more closely we tried to see what was actually in the minds of the framers when they made the Constitution we would reach the same result.

The contention on the other side is that the "United States" means "States united." *It does not mean States and Territories; and therefore if we can show that the framers of the Constitution, when they wrote that clause, had in mind every single foot of territory over which the flag of the United States flew, in sovereign jurisdiction, both State and Territory, then I think we have an answer to their contention that "United States" meant only the States.*

As we understand it, the treaty with Great Britain defined the limits of the United States. It defined and limited the territory over which the Government of Great Britain recognized that a new Government had arisen having full right and jurisdiction. Those limits included great tracts of land claimed, under vague

charters, by some of the States, and the ownership of which caused conflict and bitter dissension. In order to remedy that, and before the adoption of the Federal Constitution, while the States were living under the League of Friendship, cessions of all this vast territory were made to the United States, so that the United States Government then, and then for the first time, had jurisdiction over it all.

Thereafter the Articles of Confederation thus came to include, in the territorial sense at least, two things. In the first place only "States united." This was its original meaning. The phrase could be inverted, and the meaning was the same; but after the cession it came to include also the ceded territory which was the germ of our national sovereignty; that territory which the States owned in common. And this required a new name. The framers might have said, as Chief Justice Marshall has done, the American Empire, but they did not; they used the same phrase, "The United States." That phrase now covered a vast territory, and from the moment those cessions were made, " The United States," had a meaning, not heretofore known, which included all that territory, the National Territory over which the Government of the United States and the people of the United States had sovereign jurisdiction.

Therefore, there is a difference between "The United States " and "States United " in the Constitution, because between the making of the Articles of Confederation and the Constitution a new fact and factor had arisen, and "United States" meant something more than States United. That the framers of the Constitution understood this can scarcely be doubted.

At the same time that they were framing the Constitution and debating each separate proposition in detail, some of them were in Congress engaged in draughting the great ordinance for the Northwest Territory. It was in some sort a model for the Constitution. This much, therefore, is clear, that they had the government of that territory in mind.

It might seem, if we did not have these pertinent facts before us, that the framers themselves did not intend anything regarding territory and people outside the States, and it might be argued with a certain show of plausibility that they did not intend United States should mean anything but "States United" had they not then had before them this great Northwest Territory and this Ordinance. In endeavoring to find out exactly what the nation's Constitution framers were striving to do, and in trying to find out what they intended, we see that the framers had in their minds the Northwest Territory, that they had it there before them, and it is therefore only fair to assume that they understood that the term "United States" could and often did mean the whole country over which the flag flew in sovereign dominion.

If that is not so, I ask what term was there in the English language which they could have used to include that Territory. There must have been some word to indicate all the lands ceded by Great Britain, and when part of them ceased to belong to the States, there must have been some term denoting both it and the States, and it must have been within the term "United States," because there was no other then or now. This meant all the territory included within the provisions of the treaty of peace, the territory for which the Nation had fought.

Therefore we see that the phrase itself "United States" may very properly mean in the Constitution exactly what in common every-day conventional language it now means, the whole dominion over which the United States Government has jurisdiction. It may mean that, because all the factors were then, as they are now present, States United (all the factors of the old Confederacy), and the new territory or folkland annexed by the nation.

We have the fact that the new territory was in the minds of the framers, that they had it before them at the time and it is reasonable to suppose that the expres-

sion "throughout the United States" must have indicated the whole of the land ceded by Great Britain.

The framers and the people did not proceed to distinguish difference in their Bill of Rights between the people of the land ceded by the States and those of States themselves, nor to decree that the inhabitants of those territories were to have lesser and fewer rights than if they had remained a part of the States which originally ceded them.

The words "United States" are used in several connections in the Constitution as having the same meaning as we claim here for them. It is fair, in seeking to find an interpretation of a law or statute or of the Constitution, to take into consideration contemporaneous statements and facts; what did the early Congresses do, and how did the Congresses in which some of the framers sat, interpret that instrument? I think a survey of the early naturalization laws, the internal revenue law, and the early customs law, will show that the Congress of the United States intended that the same rule as to naturalization and revenue and customs should apply throughout all that territory regardless of whether it was a State or whether it was a Territory of the United States.

The early naturalization laws provided that residence in the Territories northwest of the Ohio River should be included within the time necessary to make a person a citizen of the United States, and the courts of that territory, in I think 1795, were empowered to naturalize citizens; *so that if the contention of our learned friends be right, we have the remarkable fact that the courts of countries not a part of the United States had the power to make citizens of the United States of persons who had never lived there. Certainly a strange situation.*

The internal revenue laws, which I shall not discuss fully and in detail, because counsel who are to follow me are to discuss them, used the words "in the United States" and "throughout the United States,"

meaning thereby that the revenue should be collected throughout the Northwest Territory and all places over which the United States had jurisdiction, and certain acts were passed empowering the President to appoint collectors to collect the revenue authorized to be raised by that law within the Northwest Territory. Here, then, is clear proof of what those gentlemen who were closer to the Constitution by far than any of us, believed is meant by United States.

January 9.

Mr. Coudert: If the Honorable Court please, before taking up the argument where it was interrupted yesterday by the adjournment of the Court, I would like to refer to the question kindly put to me by the learned Mr. Justice Brown. I would like to answer that question now, because in the course of argument it may happen that it may not be touched upon it as fully as it deserves, or be answered to the satisfaction of the Justice.

As I understood the question, the learned Justice desired to know whether a country can cease to be a foreign country, and yet not be a part of the United States. An answer to that question is found in two cases, Fleming *v.* Page, and Cross *v.* Harrison, and both of these cases are of course so familiar to the Court that it would be a waste of time to discuss them.

I think there is a peculiar situation in which a foreign country may find itself; *it may be under the temporary jurisdiction of the United States military forces.* The boundaries of the United States do not advance nor recede with the armies of the United States. The people of such country are under the temporary military jurisdiction of the United States. Such a place, under Chief Justice Taney's construction, and I think it is a perfectly correct view, entirely in accordance with the usual dicta of international law, is a foreign country. Why? Because there is still a foreign element in it. The foreign sovereign has some rights remain-

ing. They are temporarily suspended and cannot for the moment be exercised, as was the jurisdiction of the United States in Castine in the second war with Great Britain. Nevertheless the dispossessed sovereign has certain rights there, and should the advancing army of the United States cease to advance and begin to recede, he could come back and his rights which were simply dormant would then spring into existence, and the ante-bellum status revive, under that rule of the law of nations, denominated *post liminium*.

For that reason I think a country in such situation might come within the general category of a foreign country. The apparent anomaly is that the jurisdiction of the foreign sovereign is for the moment ousted; but still the sovereign has rights, which remain until the United States, the conquering country, evinces a clear intent to definitely and for all time, terminate those rights. That intention, as I understand it, may be exercised in one of two ways, either by a permanent conquest establishing a settled government holding ourselves out ostentatiously to the world as the holders of that territory, thus evincing a purpose to occupy it definitely and to make it a part of our own country, or annexing it through the treaty or law-making powers.

Chief Justice Taney, in Fleming *v.* Page, held, as I understand, that a port simply in the military control of the United States was a foreign port within the meaning of the custom revenue law; really a foreign port. I assent and also agree with the decision in Cross *v.* Harrison, to the effect that after the Mexican treaty of peace and cession the port of San Francisco became a domestic port.

Mr. Justice Brown: My question was whether there was an intermediate stage after a port ceased to be a foreign port and before it became a port of the United States.

Mr. Coudert: I think, if your Honor please, that there is that intermediate stage. Strictly speaking, the Territory of Tampico during the Mexican War was not

for the time being a foreign country, because not under the immediate jurisdiction of a foreign sovereign. It was under the jurisdiction of the United States, but it was not a part of the United States. I admit that. It seems to me clear, (1) because the United States had evinced no intention of maintaining a permanent jurisdiction there, and (2) because it had not acquired title to that country by treaty, and the rights of the foreign sovereign temporarily ousted were not absolutely cut off. This distinction is made in Cross *v.* Harrison, where the Court said, "by the ratification of the treaty of peace, California became a part of the United States," and we simply claim that by the ratification of the treaty of peace Porto Rico, which up to that time may have been a foreign country, although under the temporary military jurisdiction of the United States, by the ratification of the treaty of 1898 became a part of the United States.

I respectfully submit that those two cases show the transition from the one condition to the other, the transition from the Tampico case to the Cross and Harrison case marking the intermediate stage. Tampico was in that stage, and by the ratification it reverted to Mexico, but California became a part of the United States. Castine, I think, was in the same position, and ceased momentarily to be a part of the United States and became a foreign country in a certain sense, because it was under British jurisdiction, but it never became a part of Great Britain, because Great Britain never had that intent, or if it had, did not make it good.

At the close of the argument of yesterday, I was directing myself to the question, which I believe to be the underlying question determinative of this case, namely, what portion of the Constitution applies to the new possessions, and specifically, whether the uniformity clause applies.

That, of course, leads to the inquiry whether Porto Rico is or is not a part of the United States, and that

is primarily a question of the intention which the framers of the Constitution had in mind in wording the taxing clause. I have attempted to show that the word itself was a word applicable to the whole country over which we have jurisdiction—that the words "in" or "throughout," when used in the Constitution of the United States, indicate space and have a different meaning from "Union." The "United States" is sometimes used in the sense of governmental unity or of States United, and I endeavored to show that this was not the only meaning of the expression itself but that the framers had in mind all the elements of another meaning. They had in mind the Northwest Territory. Therefore, if the Northwest Territory was, as we attempted to show it was, a part of the United States, we contend that territory subsequently coming into the possession of the United States would be upon the same footing, within the intendment of the general taxing clause of the Constitution.

I may say, as to the Northwest Territory, before passing from this branch of the subject, that the old soldiers of the Revolution were allowed to settle that country and were given certain peculiar rights and privileges there as to the disposition and occupation of the land. Nobody suggested to them, and I imagine that they would have been very much surprised if the theory had been propounded, that they were foreigners to the Constitution, and were dwelling in a foreign country, as my learned friend seems to think that the Territories of the United States were and are. I imagine it would not have been altogether a safe proposition to propound to those military gentlemen, and certainly nobody ever attempted it.

Some stress, however, has been laid upon a peculiar letter of Gouverneur Morris in relation to the "rules and regulations" clause, and I am pleased to see that the Government counsel, with the candor that always characterizes him, has given it in full. It seems that Gouverneur Morris was the author of the rules and reg-

ulations clause, which the learned Attorney General claims is the clause of the Constitution giving the Government special unlimited powers over Territories; he was asked what he meant by the clause, and he writes:

> "I always thought that when we should acquire
> "Canada and Louisiana, it would be proper to gov-
> "ern them as provinces and allow them no voice
> "in our councils. In wording the third section
> "of the fourth article, I went as far as circum-
> "stances would permit to establish the exclusion."

And here comes the honesty of the man:

"*Candor obliges me to add my belief that had it been more pointedly expressed, a strong opposition would have been made.*"

Two things may be noted about this letter.

MR. JUSTICE GRAY: What is the date of that letter?

MR. COUDERT: I can refer to it.

THE ATTORNEY GENERAL: 1803 or 1804.

MR. JUSTICE GRAY: Some time subsequent to the adoption of the Constitution?

MR. COUDERT: Yes, sir, some fifteen years later.

Two things, it seems to me, should be noted about it. In the first place, there is nothing to show that the mere restrictive clauses of the Constitution were not meant by Morris to apply to the government of the territories under the rules and regulations clause, because he said, "I always thought that when we should acquire Canada and Louisiana as provinces, *we should allow them no voice in our councils.*" It is very clear that what was meant was that they should not be permitted to come in as States on the same footing under the Constitution as the other States. The balance of political power, that is evidently what he had in mind, and it throws no light upon the question of whether he meant to exclude them from the benefits of just and equal taxation, or the other rights guaranteed to all men by the Constitution. But the latter part of

the letter is the more remarkable part, because Morris, knowing the sentiments of the Convention, and understanding how each member felt, is forced, as he himself admits, to resort to a subterfuge to inject into the Constitution a clause which he thought might later be tortured into carrying out an idea of his own. As a member of that Convention he did not dare to propose this, because he knew it would not be accepted.

Morris simply substituted the rules and regulations clause for the clause in the Pinckney Draft "to appropriate unappropriated lands of the United States." It was understood by the Convention to have the same meaning. Therefore, it seems to me that if the Government can derive any advantage from citing that precedent, they are welcome to it. They rest their case upon an admitted subterfuge.

The rule established for determining what territory constituted the United States as that expression is used in the uniformity clause is demonstrated by the instance of the Northwest Territory.

The criterion or canon of interpretation established, we take it is: what territory is under the absolute sovereign dominion of the United States, in which no foreign potentate or people have any rights? The Northwest Territory was not a State but was precisely in that position.

If then we can show that other subsequently acquired territory was held in exactly the same way as the Northwest Territory, it follows, from our first proposition, that the same criterion applies to it, and it became a part of the United States within the intention of the framers as expressed in the uniformity clause.

If it be said that actually they had no intention of authorizing the annexation of new territory, we can only say that this Court, and notably the great Chief Justice, have otherwise decided. But even though they had no such actual intention in their minds, they were very clear that cer-

tain rights should not be denied to any person under the jurisdiction of the United States, and it is a very unfair inference to assume that had they had in mind new territory, they would have desired that it should be treated differently from the Northwest Territory. There is nothing to show that they would; on the contrary, the territory they already had was to have the benefit of certain clauses of the Constitution which should apply equally to all men, limiting the power of the Government over life and property. Why not new territory?

The learned counsel for the Government have seemed to derive a great deal of comfort from the history of the annexation of Louisiana, although the learned Attorney General is quite frank enough to admit that the restrictive clauses, such as the uniformity clause and the right to have a religion or a nobility established, did not apply to even the Northwest Territory. The Attorney General seems to think that Louisiana came in on a peculiar footing; that it was not a part of the United States, and did not become a part of the United States, until Congress admitted it as a State.

We respectfully submit as our position on this point, that the Louisiana precedent, and what various statesmen may have said about that annexation, cannot affect the views of this Court, one way or the other. Aside from that, however, there is a peculiar confusion that runs all through the Attorney General's treatment of this precedent. He speaks of incorporating territory within the United States, as though it were something different from incorporating it into the United States as a State. In the Goetze case the learned Circuit Judge uses as an equivalent expression "bringing it in under our organic law." The thing that troubled Jefferson and the strict constructionists in the Louisiana cession was the same thing Livingston had in mind when he put in the treaty a provision for admitting Louisiana to Statehood. That provision meant,

that the Territory of Louisiana should come in, not merely under the sovereign jurisdiction of the United States, but should come in as a State, and Mr. Jefferson knew that it was a very doubtful thing whether the treaty power had a right to stipulate for that, because it was a power conferred upon Congress. Moreover, he was in doubt as to whether Congress itself could admit newly acquired territory without an amendment of the Constitution.

I am perfectly willing to admit, although I am not entirely sure that it would be a correct interpretation of history, that Mr. Jefferson acknowledged the right of the Government to annex new territory as a dependency, but what he really feared was the bringing in by the treaty of new territory *as a State* which might disturb the nice partnership balance which the States had established among themselves The admission of a new partner he thought could never be allowed without the consent of the others. And all through these debates where the subject of incorporation is spoken of, it means only one thing, I assert it without fear of contradiction: *Incorporation into the Union as a State.* It did not mean that this province of Louisiana was a thing that was not domestic and was not foreign, and which had a status entirely unknown to our law and former history; it meant what is stated in the treaty and nothing else, *i. e.*, admission to the Union of States.

I have an authority, which I think has not been cited to your Honors before. I am extremely anxious not to waste time by going over authorities which have been already cited to the Court.

The inhabitants of New Orleans in the year 1804 petitioned Congress in a great remonstrance, which was, I believe, drawn by Livingston. The clause of the treaty itself upon which the remonstrance was based, was as follows:

"The inhabitants of the ceded territory shall be

"incorporated into the Union of the United States
"and admitted as soon as possible according to the
"principles of the Federal Constitution to the en-
"joyment of all rights, advantages and immunities
"of citizens of the United States."

And the remonstrance asked Congress to admit them at once, because, they said, You are in honor bound to do it; the treaty stipulated that we should be admitted at once, and not wait until Congress so desired. To that great remonstrance Congress replied. Randolph drew the report of the Committee. That report said:

"We consider, in the first place, that the clause,
"which is the ground of your claim, is a stipulation
"made expressly in favor of the inhabitants of
"Louisiana then existing, because the French Gov-
"ernment had no right to stipulate the incorpora-
"tion of the *future* citizens of Louisiana. We
"think that the words 'as soon as possible, accord-
"ing to the principles of the Constitution,' evi-
"dently express that this incorporation is to be
"executed without any unnecessary delay,"——

There was the sole cause of the difference between the representatives of Louisiana and the majority in Congress; when should they be admitted? The treaty provided for admission. The Congressional Committee answered:

"We humbly think that any interpretation tend-
"ing to procrastinate the incorporation of the
"*present* inhabitants of Louisiana into the Union
"is directly opposite to the spirit of the Third
"Article of Cession of our country."——

That is how Congress understood it, just as we contend.

"The object of which is unquestionably to se-
"cure that advantage (incorporation) to the in-
"habitants who are annexed to the United States
"by that treaty."

So that it is clear what the statesmen of the time thought. The provision in the treaty simply provided for statehood and the admission of the inhabitants to the same rights as those possessed by the inhabitants of the respective States; nothing else. Therefore, that Article of the treaty throws absolutely no light whatever upon this question.

What was the practice in the Louisiana case? Did the Government then contend, as the Government contends here, that in dealing with Louisiana it might do exactly as it liked; that judicial officers or executive officers might search the houses of the inhabitants as English officers did in the Wilkes case, or that Congress could establish a religion or order of nobility there?

Not at all; not at all. Congress did not do any of these things. The theory that they could do them was not advanced. The two bills passed by Congress upon this subject are proof of this. The first law merely authorized the President *to take possession for the purpose of protecting the inhabitants in their liberty, property and religion;* the second law, passed within less than a year after the cession, gave to the inhabitants of Louisiana all the common law rights, every one of them. Of course I do not say that they might not have had them without the law. We know that a part of the law of the United States is merely declarative. It does not follow that this Honorable Court is a legislative and not a Constitutional Court because a part of the Constitution is legislated into the judiciary act.

The interpretation acted upon by Congress in the case of the Louisiana treaty was evidently that the Government in legislating for it was restrained by all the great prohibitions of the Constitution, and the only exception to that—I want to state the matter with perfect fairness—in the law was the right to common law jury trial in civil actions. That was restricted to the amount of one hundred dollars instead of the twenty dollars

stipulated in the VIIth Amendment. To that we may answer, it was a small matter; it may have been overlooked, and it was never brought to the attention of this Court. But there is another answer; the inhabitants of that territory were living under the civil law. They knew nothing of the common law. There was no such distinction in their French and Spanish jurisprudence as law and equity, and I am inclined to believe that Congress may have given even more than was required by the Constitution in legislating the machinery of that Amendment into Louisiana, because the differentiation between common law and equity might very well be held not to be applicable to a country where equity and common law had no existence. Thus this is only an apparent exception, and it is of no importance when we compare it with the fact that the whole Bill of Rights was legislated into Louisiana without debate or question.

So that, to sum up on this point, we contend that Louisiana simply came in as a Territory under the sovereign domain and jurisdiction of the United States, in which no other sovereign or people had any rights of any kind or character whatsoever; that it was thus upon precisely the same footing as the Northwest Territory had been, and upon no other; that the words "The United States" as used in the Constitution must have included Louisiana after the cession, independent of any treaty stipulation, because the treaty stipulation only referred to admission to statehood.

The same reasoning would apply to Florida and to California, but a comparison of the Mexican and the Louisiana treaties show very clearly how the difficulties that the statesmen of the times had had with the Louisiana treaty were remembered and avoided. The first treaty (Louisiana) says:

> "The inhabitants of the ceded territory shall be
> "incorporated into the Union of the United States
> "and admitted as soon as possible according to the

" principles of the Federal Constitution to the en-
" joyment of all rights, advantages and immunities
" of citizens of the United States."

But in the Mexican treaty the words " but at the proper time by act of Congress" are added.

That was evidently done to avoid the difficulty experienced with the Louisiana treaty, by providing that the inhabitants should be admitted to statehood only when Congress so desired. But the conquered Mexican territory, as shown in Cross *v.* Harrison, received upon the cession the benefit of the Bill of Rights and the uniformity clause of the Constitution.

The precedent drawn from the cession of California is thus entirely in accordance with our contention. " Upon the ratification of the treaty California became a part of the United States," said the Supreme Court, and the only question was what provisions of the Constitution and laws of the United States should apply. It was admitted that the revenue law did apply.

As to Alaska that was the only one of the treaty cessions which did not provide for the admission, either immediate or in the discretion of Congress, to statehood; that treaty provided that the inhabitants who remained there three years should become citizens of the United States. It evidently intended that the three years' residence there should be the rule by which it should be determined whether they had renounced their Russian allegiance.

Mr. Justice Shiras: That is the civilized Russians?

Mr. Coudert: Yes, sir, I am glad your Honor mentioned that point. The provision had reference to residents who did not belong to the "uncivilized *tribes*," as the treaty further said.

We contend then that the term "throughout the United States" is a geographical designation of all the territory embraced within the sovereign domain of the United States in which no other nation has any rights,

and we believe that this is so from the language of the Constitution viewed both in the light in which the founders used it, and as we view it to-day; and that this meaning has been sanctioned by one hundred years of growing and continuing precedent.

The Uniformity Clause, if the learned Court please, is peculiar in this. It is not a law, but a prohibition. It requires no machinery to put it into execution. It requires no law to extend or sanction its operation. It is a mere inhibition on the power of Congress to pass certain laws, and if they pass laws in violation of the clause, if they tax without uniformity, then those laws are unconstitutional and void. But that clause must be viewed broadly, and the fallacy, or what we believe to be the fallacy of the other side, that the Constitution has no effect in the Territories unless extended, has no application to that clause, even if it does to any of the other clauses of the Constitution referred to in the so-called Bill of Rights contained in the Amendments.

That clause cannot be extended because it is an inhibition on Congress against doing certain things; Congress cannot act beyond it. Therefore the extension theory cannot and does not apply here.

Much discussion has been had as to certain judicial precedents. I will not refer to them now; the Court is more familiar with those cases than private counsel can well be.

Much has been made of the territorial Court cases, the Canter case and others, but there is one very simple distinction that differentiates that whole line of cases from the cases at bar. The Constitution in the judiciary article had undoubtedly provided for a certain kind of jurisdiction. We have two governmental organizations, State and Federal, in the Constitution, and then there is a third kind of government, that of Congress acting as a local government in a particular locality, and possessing the powers of both State and Federal. The judicial principle of

the third article applied in language and in terms only to the jurisdiction and exercise by Congress of one of these functions, namely, its Federal function, when it was acting in a State, dividing the Government in a State with the State itself. The Territorial courts are entirely different from the Federal courts, because there being no State court in the Territories, there must be some court which has jurisdiction of all questions arising between man and man. Therefore the courts there must, under the Federal jurisdiction, deal with questions arising under the Constitution and laws of the United States and also those questions which courts of States deal with, ordinary municipal jurisdiction. That point of view seems to me to distinguish all those cases so that they can have no bearing on this case.

The Canter case was decided by Chief Justice Marshall, who also decided the case of Loughborough against Blake; he does not refer in the one to the other, and it is very clear that he thought the term used in the uniformity clause "The United States," referred to the whole United States or "American Empire." He does not suggest any such question as that which has been raised here as to the Territory not being in the then United States. On the contrary, he expressly repudiates the suggestion that Florida was not a part of the United States, because he admits the inhabitants are citizens.

The uniformity clause, it seems to us, applies to the whole United States for another reason. I do not, many of us do not, believe in the mere blind worship of everything that the framers of the Constitution did. They did unwise things, as other lawyers and statesmen have done, but it must be admitted that they did some wise things; even counsel for the Government will admit that.

The ingenuity of man I believe could not have found any clause more apt to protect not only the States

but the Territories from unjust taxation and unjust oppression than the uniformity clause. As Marshall has said, they had devised a scheme—direct taxes proportionate to population, which, although the Territories had no representation, prevented their being overtaxed, and they had devised a scheme of uniformity not altogether, as seems to be supposed, for the purpose of protecting the minority States against the majority States; but for the purpose of protecting the people who needed protection more than those of the States, the people who had no representation at all, not even a minority representation. The old ordinance for the government of the Northwest Territory, before the adoption of the Constitution, provided for the apportionment of taxes upon the Territory in the same way as upon the States. If we accept the conclusion that the Uniformity clause was only intended for the States, we will have to accept the further conclusion that the framers of the Constitution deliberately desired to give to Congress a power over the Territories oppressive and different from the power that it had under the old Confederation and in the States under the Constitution.

Mr. Justice White: If the object of that last article in the Constitution was to protect the people in the Territories from unjust taxation, how is it that no requirement was imposed restricting the power of Congress when it dealt with those Territories in the administration of what you say was its local or State power? In other words, under your construction of the Constitution, Congress would have the right, legislative or local, over these Territories, to establish an ununiform, unequal and unjust taxation on the people of the Territories, when acting as a local legislature. Therefore your argument is that they intended to protect the people of the Territories, and yet did not protect them, although they had that in mind.

Mr. Coudert: If your premise is correct, the conclusion would be so. I have not made myself clear, it seems. I say there is no question but that Congress there

acts as a local body, and has certain legislative powers. The Court has made this very clear in the Yankton case. Congress has two kinds of authority, one the Federal where it is bound by all the prohibitions of the Constitution on the Federal power. Then in the Territories it has all the powers which a State has within its own borders.

There are things, however, which a State within its own borders cannot do under the Constitution, and this is one of the things which a State cannot do. Neither in its individual capacity, nor in its dual capacity, can Congress impose taxes which are not uniform. If it undertakes to do it in its Federal capacity, clearly that is a violation of the Constitution, and if in its State or local capacity, then it is something which it has no right to do, because it is a regulation of commerce.

MR. JUSTICE HARLAN: What is it that the State cannot do?

MR. COUDERT: The State could not tax foreign commerce; they could not tax exports and imports.

MR. JUSTICE HARLAN: Might not the State lay a tax that was not uniform as far as the Constitution of the United States was concerned?

MR. COUDERT: As far as the internal taxes of a State are concerned, their local taxes, to be used in the locality and paid into its treasury, for local purposes unquestionably so, if the Constitution of the State permitted it. Of course that would depend upon the provisions of their own Constitution. But the State itself is specifically forbidden to exercise the power to tax *exports and imports;* and that class of taxes, namely, imposts, are under the protection of the Federal Government; in imposing such taxes Congress is not acting as a local legislature and is under the general inhibitions. That is a point I would like to make clear, if your Honor please, because your question is very pertinent and gives me an opportunity of emphasizing an important point. Congress as a local legislature is necessarily confined to local purposes. It cannot have the power that is

given to it for Federal purposes when it is acting as the State, as the Territorial, Government of Porto Rico. In such capacity it cannot tax the residents of New York. This seems to me clear, and I rely upon the case of the National Bank of St. Nicholas *v.* County of Yankton, in which the Court has collated all the authorities.

Its right so to tax is only for *local purposes,* and not "for the common support and general welfare of the United States," as when it taxes under the general taxing clause of the Constitution. As to the rights of Congress within a Territory, it may impose the same taxes as a State, but they must be local. The moment they become imposts, a tax which a State cannot impose, then Congress is attempting to combine the Federal and local power in a way not permitted by the Constitution.

MR. JUSTICE HARLAN: Is it your idea that the Congress in exercising its power in a Territory, is not bound by the uniform clause in the Constitution?

MR. COUDERT: I do not know that the uniform clause would affect it in the Territories. As far as imposts were concerned, as far as anything not local taxes was concerned——

MR. JUSTICE HARLAN: I am putting a case of an act of Congress legislating for a purpose purely local to the Territory, establishing roads, for instance. Do you conceive that Congress may, in taxing for that purpose, lay a tax which is not uniform in a Territory?

MR. COUDERT: I believe that acting as a local legislature for a local purpose it has the power that a State would have, because the uniformity clause only applies to general taxation, not local.

MR. JUSTICE BREWER: Does that carry with it a right of Congress to dispense with a jury and grand jury?

MR. COUDERT: I think not, if your Honor please. That clearly would bring up the question whether or not it was due process of law.

MR. JUSTICE BREWER: It is due process of law *with-*

in a State to proceed without a grand jury and by information, and would it not follow that by an act of Congress the grand jury could be dispensed with and the petit jury could be reduced in number?

MR. COUDERT: I do not think so, because there is a very clear distinction. Hurtado *v.* California, and Maxwell *v.* Dow, hold that the State may do that, because the State is the protector of civil liberty and the prohibitions in the Constitution are directly against the Federal Government, and I think an attempt to exercise that power would be in contravention of the Constitution. In other words, the rules as to trial by jury and as to due process of law in general of the Vth and XIVth Amendments would apply to Congress wherever and whenever acting. I think that is perfectly clear. The powers of Congress are similar to those of a State with this exception, that a State may, within its own borders and jurisdiction, undoubtedly do certain things that Congress is forbidden to do.

MR. JUSTICE BREWER: Then Congress does not have the same power within a Territory for a local matter as the State has within its territory for local matters?

MR. COUDERT: No, probably not; although I do not think the solution of that question is necessary to this case. I was putting the question as broadly as it could be put. Congress could not impose the tax complained of in this case as a local tax, because a State is prohibited from imposing such a tax; and Congress, when they tax imports and exports, can only do it for "the general benefit of the whole United States."

MR. JUSTICE HARLAN: What is the power of Congress to lay taxes at all in the Territories?

MR. COUDERT: If your Honor please, I think that would have to be derived from the general power of government and as incident to that, and as we admit that this government has the power of acquiring territory and governing it under the Constitution, therefore it must have the power to tax for the purpose of

defraying the expenses of government in that locality. Therefore, to tax as a local tax——

MR. JUSTICE HARLAN: Therefore, the first clause in which Congress is empowered to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States does not in your opinion apply to the Territories?

MR. COUDERT: If the learned Court please, I believe it does not apply to the Territories when Congress is acting as merely local agent. The tax authorized by the clause you mention is explicitly a general tax, not a local tax. That they can there impose local taxes is implied from their power to govern. In Stoutenberg *v.* Hennick it was held that within the District of Columbia the Congress had a power to impose all taxes for local purposes. I think that case, if I apprehend it correctly, answers your Honor's point.

MR. JUSTICE HARLAN: Then the words "United States" in the first clause do not mean what "United States" means in the third clause of the same section.

MR. COUDERT: It would mean the same thing; the whole territory——

MR. JUSTICE HARLAN: Including everything?

MR. COUDERT: Yes, sir.

MR. JUSTICE HARLAN: Then the power to tax the Territories could be based on that first clause?

MR. COUDERT: I think it might, when the power is exercised for "the common defense and general welfare," and I think Chief Justice Marshall, in Loughborough *v.* Blake did put it on that clause. If it is rested on the general power the tax here is clearly not uniform, but if rested on the local power Congress can only do what is necessary for the local needs; it can only act as a local legislature, within the local circumscription.

MR. JUSTICE WHITE: My question was not intended to go as far as that. The first question I asked you is this. You laid down the premise that "throughout

the United States" was intended in the Convention and the Constitution not only to protect the Sates but to protect the Territories from unequal and unjust taxation by Congress. Now, and if that was in the minds of the framers, how is it that they put no limitation upon Congress in the exercise of that great body of local power of taxation in the Territory which you concede must be confided to Congress by the Constitution? In other words, they restricted the Congress in the lesser, but left them unlimited and unrestrained in the greater, power of taxation.

MR. COUDERT: I think the question might be answered in this way and made more clear: As a local legislature they are still bound by the Constitution of the United States, as a State would be bound by its own Constitution, as was said in the Yankton case.

MR. JUSTICE WHITE: In the State of Connecticut there has never been any provision for uniform taxation or equal taxation since the foundation of the State, and the State held that those clauses were not inherent and the State of Connecticut had a local power to restrict taxation.

Do you say that Congress is restrained by the restrictions which are found in the State Constitutions when they tax the Territories locally for local purposes?

MR. COUDERT: Not the restraints that are found in the State Constitutions, but the restraints which are found in the Federal Constitution, because when the Congress taxes locally, acting as a local government, it is subject to the Constitution, just as when the State taxes IT is subject to its Constitution.

MR. JUSTICE WHITE: Then what is the restraint in the Federal Constitution which protects the people of the Territories when Congress is dealing with them locally?

MR. COUDERT: I think the Bill of Rights protects them, clearly.

MR. JUSTICE WHITE: What Bill of Rights?

MR. COUDERT: Amendments I to XV. I think the

uniformity clause protects them from a certain kind of taxation. At least it puts upon them only the same pressure as it put on the States.

The States United, in other words, cannot exploit the Territories for their own benefit. The Congress cannot put local taxes on the Territories for general purposes, and in the pursuance of their general powers for the uses of the general government. They are restricted there to taxing for purely local purposes. *They cannot take money from the Territories unless that money go back into the Territories.* They cannot take it from the Territories and put it into the Treasury of the United States, unless the tax be uniform, geographically uniform, throughout the United States, and therefore they cannot tax the Territories in that way without also taxing themselves, and on the best-known principles of human nature, that is the best curb that can be put upon a body of men; they must apply the same rule to others that they apply to themselves. That, if your Honors please, it seems to me, is the benefit of the uniformity clause.

The question as to just what the power of Congress is as a local legislature, it seems not necessary to go into fully here, because whatever that power may be, as it has repeatedly been held, it cannot exceed that of a State; it does not extend to the great powers of regulating commerce, that great national power, as was clearly held in the case of Stoutenburgh *v.* Hennick. As to those great powers, there is no question but they must be uniformly exercised throughout the geographical territory of the United States.

As my time is short, I will not be able to touch upon all the points I desire to examine. I will say one word before closing about the question of citizenship. That question has been gone into very fully here, and it may be that it has some relevance. We contend, and the learned Attorney General has admitted, that it is not a question of "Americans or Spaniards or Porto

Ricans; it is a question of the geographical origin of the goods and of the shipment," and if the shipment is from one part of the United States to another part of the United States, then the uniformity clause must apply.

If we can show, however, as I think we very clearly can, that within the provision of the XIV Amendment all persons born or naturalized within the United States and subject to the jurisdiction thereof are citizens of the United States and of the States wherein they reside, the citizens of Porto Rico are citizens of the United States, and under the principle of the greater including the less all territory over which no foreign nation has any rights and in which the inhabitants are citizens of the United States, is a portion or part of the United States.

MR. JUSTICE HARLAN: Is it your view of the XIVth Amendment, or does your argument require you to hold, that the words of the XIVth Amendment "all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States," includes the Porto Ricans and the Filipinos?

MR. COUDERT: Born subsequent to the cession?

MR. JUSTICE HARLAN: Born before the XIVth Amendment.

MR. COUDERT: No, sir.

MR. JUSTICE HARLAN: That is ten years ago?

MR. COUDERT: The XIVth Amendment would not affect him as I understand it.

MR. JUSTICE HARLAN: Would it embrace him?

MR. COUDERT: Born before the cession?

MR. JUSTICE HARLAN: Born ten years ago.

MR. COUDERT: No, sir, I do not think it would. I think it embraces all those born subsequent to the cession. The point I do make is this, that the Government has confused, and that the Court below has confused, the meaning of "citizenship." Judge Townsend summed up the Government contention in a word when he said that the

political status was left to Congress, and that as these people were foreigners before the cession and Congress had not changed that status, and they remained foreigners; they were foreigners still, and hence Porto Rico was foreign. If his major premise is wrong, and assuming it is wrong, his deduction is false.

MR. JUSTICE GRAY: Do you contend that all those born in these dominions after the treaty were citizens?

MR. COUDERT: I think so, with one exception, and I wanted to come to that point, because I think it is very important. Citizenship in our language means two things. It has a confused meaning. It means *nationality*,—belonging to some particular country in the political sense,—some particular nation under a sovereign jurisdiction, and in that sense all within our territory, owing us permanent allegiance, are citizens; women, children and all persons in the Territories; "citizen," I want to make this clear, is absolutely identical with "subject" when used in that sense. Citizenship and subjection depend on two things, the allegiance of the citizen and the protection which the government owes to him. When those two things are united, we have "naked citizenship," or subjection. The word "subject" has been discarded from the constitutionally governed nations of Europe, except Great Britain. None of them use it now, because the word "subject" usually carries with it the idea of a peculiar kind of government, a feudal or absolute government.

That distinction has been recognized in this Court, and I think Mr. Justice Gray, in the case of Wong Kim Ark *v.* United States, said that citizenship depended on the requisites necessary to make a subject according to the common law. Therefore, I am surprised to find the suggestion made here by the learned Attorney General that "subject" has nothing to do with the character of the government. Subjection, or the word "subject" usually means the citizenship of an absolute government, —one unrestrained by a Constitution.

We claim first, that by the cession the native in-

habitants of Porto Rico who were not allowed to maintain their allegiance to Spain acquired the "nationality of the territory," as the Treaty says (Cuba being in one category and Porto Rico in another, the treaty had to use that phrase). What is the nationality of Porto Rico? It is not sovereign, it is not independent. We govern it. Nationality can mean only one thing here, the nationality of the United States, and all these inhabitants, not subject to Spain, not subject to any foreign power, became United States *nationals*. If the learned Attorney General means that and that only, it is no disgrace, as he says, to be an "American subject," because all women and all minors everywhere and all the men living in the Territories and having no representation and no right to vote, are all subjects. In France and in Germany they have discarded the word "subject" in order to avoid its objectionable inference, and they have used another word. They have adopted the word "*national*" and they use it in the sense that the word "subject" was used, so that a French "national" means any person subject to the French Government and protected by it; only having the right to vote when possessing certain required qualifications.

But the learned Attorney General seems to mean something more when he says "it is no disgrace to be an American subject"; he cites two instances, and two only, and I am glad he cites them, because they are good precedents for the position the Government takes, to prove that these inhabitants are not citizens in the sense of nationals.

First, the Indian tribes, and

Second, the free negro prior to the XIVth Amendment.

In the case of Elk *v.* Wilkins, it is made very clear that the Indian had to be naturalized to become a citizen, because he owed an allegiance to his tribe, and the requisites of citizenship at the common law were not possessed by the Indian because he owed such al-

legiance, consequently he had not the qualities for subjection at the common law. And if we treated any of the Filipinos as members of a tribe and recognized their primary allegiance to a chief, then they would not be citizens in any sense, and of course could not possess any political rights.

The second precedent invoked is from the Dred Scott case, the precedent of the free negro, and I confess that I heard with some surprise the bringing forward by the Government of that instance. The Attorney General says that the free negro was not a citizen even in that broad sense; *a native* possessing any civil rights; he instances the 1335 free negroes who came in with Louisiana. *They were not citizens.*

Why then, he asks, should the inhabitants of Porto Rico be supposed to possess any of the rights of citizenship?

Judge Taney states why the negro could not be a citizen; the reason lay in the unfortunate condition of that race,—that no rights had ever been acknowledged in it, it had no rights which the white man was bound to respect; because there was something distinguishing it from all other races. *It was capable of being made property and even when manumitted, was capable of being made property again;* the Constitution treated it as property; as being something which was in the domain of natural history or zoology, and not in the domain of mankind, not a thing that could possess rights. It was like a horse or a dog, and that was the reason that the free negro had no citizenship. But I can see no reason in this degrading precedent why the learned Attorney General should suppose that the inhabitants of this island of Porto Rico occupy that *debased* position in common with the ante-bellum negro, of being capable of reduction to property.

One of the great international law writers has said that in the old days there was an exception to this rule of nationality acquired by cession; that when a nation

conquered another in war and the new people came in, they were generally made property, and subjection and citizenship were then different things.

The negroes were subjects only in the sense that cattle are subjects. But the XIVth Amendment has abolished that condition, and has taken that class of persons out of our system, and now *all* persons born within the jurisdiction of the United States (and that includes the Territories), all persons born within the geographical boundaries of the United States, are citizens, with the exception of the Indian tribes.

I would say in closing that the consequences which the Government has to fear from the interpretation of this treaty, as we contend it should be interpreted, is not that civil rights may go into these new territories. It has only one fear, as appears from what the Solicitor General says. It is the fear that these colonials will be able to bring their products into our markets on the same footing with inhabitants of the States. Secretary Root has said in his Report that there are certain inherent rights which the people of the United States possess under the Constitution. These include practically all the civil rights, all the rights of man. But he says that there are some which are not essential, and in arguing he says, "to illustrate, the people of Porto Rico have not the right to demand that duties should be uniform between Porto Rico and the United States, because the provision in the Constitution to that effect was not made for them." He is not afraid of the Constitution unless of that section.

The "Industrial Brief" filed with the Government brief also makes this plain. It says that there are certain industrial properties which have as great an interest as the Government itself in the solution of the questions here presented; that is the true reason that access to and free trade between the people of Porto Rico and our ports is dreaded.

We have heretofore governed territories peopled by all kinds of races, and religions, and laws, and given them the benefit of the Constitution, and we have had the best governed colonies, territories or dependencies, or whatever we choose to call them, in the world. Neither the protection of "industrial interests" nor the dread of uniformity and fairness in taxation has interfered with this result.

In closing, I can only add that if it should happen for any reason, and we do not believe that it will, that any of the governmental restrictions upon Congress would so unduly hamper it in properly governing these territories, then there is something which will cure that evil, which has not been even suggested by the other side. If for any reason we are "lame and impotent," there is a remedy which the Constitution itself affords. The framers knew enough to provide how the Constitution should be changed to meet varying circumstances. What more could they do?

The wisdom of the remedy provided is best demonstrated in the words of the first President, whose language has not become obsolete even in this time of imperialistic excitement and "large ideas."

"If in the opinion of the people, the distribution or "modification of the Constitutional powers be in any "particular wrong, let it be corrected by an amend-"ment in the way in which the Constitution designates. "But let there be no change by usurpation; for though "this in one instance may be the instrument of good, "it is the customary weapon by which free govern-"ments are destroyed. The precedent must always "greatly overbalance in permanent evil any partial "or transient benefit which the use can at any time "yield."